IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 1004 of 1982

For Approval and Signature:

Hon'ble MISS JUSTICE R.M. DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MAHENDRA RATILAL VORA

Versus

JAYANTILAL VRAJLAL SHUKLA [SINCE DECD THRO HIS HEIRS]

Appearance:

MR DEEPAK M SHAH for Petitioner

MR SURESH M SHAH for Respondents

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 27/09/2002

ORAL JUDGEMENT

This Revision Application preferred under section 29 (2) of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 [hereinafter referred to as, "the Rent Act"] arises from the judgment and order dated 28th April, 1982 passed by the learned Assistant Judge, Rajkot in Civil Appeal No. 17 of 1980. The petitioner before

this Court is the Appellant-Defendant.

The suit premises is part of a residential building situated at Bhaktinagar Society, Rajkot. The suit premises was leased to the defendant for a monthly rent of Rs. 125/=. In addition to the monthly rent, the liability of paying the house tax and the educational cess was upon the defendant. The defendant was in arrears of rent since 1st February, 1976. A notice of demand as envisaged under sub-section 2 of Section 12 of the Rent Act was given on 3rd October, 1976. The suit notice was sent to the defendant by registered post. The said registered post was returned to the plaintiff with an endorsement of refusal made on 11th October, 1976. In the meantime, on 7th October,1976, the defendant sent a sum of Rs. 500/= being the amount of rent for four months for the period from 1st February, 1976 till 31st May, 1976. The said amount being part-payment of the arrears of rent demanded, was not accepted by the plaintiff. The suit notice was sent to the defendant also under the certificate of posting.

The plaintiff instituted Civil Suit No. 5 of 1977 in the court of Civil Judge [SD], Rajkot for recovery of possession of the suit premises and the arrears of rent. The suit was later on transferred to the Small Causes Court, Rajkot and was renumbered as Rent Civil Suit No. 306 of 1979. The suit was contested by the defendant by filing written statement Exh. 22. The defendant raised plea of rent being excessive and claimed that the standard rent of the suit premises should be Rs. 45/= per month. The defendant also denied the service of the suit notice or the refusal to receive such notice by him. Pending the said suit, on 28th July, 1978, the plaintiff moved Application Exh. 25 under section 11 (4) of the Rent Act. The plaintiff claimed that on the date of the suit, a sum of Rs. 2410=80, being the amount of rent for the period from 1st February, 1976 till 31st October, 1976, the mesne profit for the period from 1st November, 1976 to 31st December, 1976, the House Tax and the Education Cess for the period from 26th February, 1971 to 30th September, 1976 and the cost of the notice was due to the plaintiff. That a further sum of Rs. 2,500/= had become due, being the amount of mesne profit from 3rd January, 1977 i.e., the date of the suit. The plaintiff alleged that the defendant was avoiding to pay the amount due to the plaintiff under the guise of rent being excessive. It was, therefore, prayed that the defendant be ordered to pay or deposit the said amount, and if the defendant fails to comply with such order, his defence be struck off. In answer to the said

application, the defendant on 1st December, 1978 filed Application Exh. 30 and prayed for decision on the issue of the standard rent of the suit premises as a preliminary issue.

The Application Exh. 25 was decided on 17th January, 1979. The learned Judge directed the defendant to deposit a sum of Rs. 5,505/= on or before 19th February, 1979 and to go on paying further rent every month regularly on or before 10th day of every month. The Court further observed that, "if the defendant fails to comply with this order, he shall not be entitled to appear in or defend the suit." Feeling aggrieved, the defendant filed Application Exh. 31 and prayed for setting aside of the Order dated 17th January, 1979 made below Application Exh. 25. It was alleged that on 17th January, 1979 the suit was not posted for hearing and the order was made in absence of the learned advocate for the defendant. The said application was rejected. On 6th October, 1979, the defendant moved another Application Exh. 34 stating that the defendant had deposited a sum of Rs. 1900/= and that he be given further time to deposit the remainder of the amount. The application was rejected on 22nd November, 1979. On the same day, the defendant also gave Application Exh. 59 for permission to appear and defendant the suit. The said Application too was rejected. Thus, the suit proceeded ex parte. The learned trial Judge, under the judgment and order dated 4th December, 1979 allowed the suit and passed the decree for possession and for recovery of arrears of rent to the tune of s. 1,670/=. The standard rent of the suit premises was fixed at s. 125/= per month and the education cess @ 50%. The Court directed inquiry as to the mesne profit under Order XX Rule 12 CPC.

Feeling aggrieved, the defendant preferred Civil Appeal No. 70 of 1980 in the District Court, Rajkot. The said Appeal was dismissed under the impugned judgment and order dated 28th April, 1982 by the learned Assistant Judge, Rajkot. Feeling aggrieved, the defendant has preferred the present Revision Application.

Mr. Shah has submitted that there is no proof of service of the suit notice. The suit notice, therefore, cannot be said to have been validly served upon the defendant and the suit, therefore, deserves to the dismissed as not maintainable. He has submitted that mere endorsement of refusal made by a Postman is not a sufficient evidence of valid service. He has also submitted that the defendant was ordinarily residing at Calcutta. The plaintiff was aware about the said fact,

nonetheless, he had sent the notice at the suit premises. The defendant, therefore, could not have received the same nor could he have refused to accept the same. He has submitted that it is a deliberate act of the plaintiff to send the suit notice [Exh. 42] at the suit premises so as to create evidence of service. Mr. Shah has next contended that the learned trial Judge has failed to exercise jurisdiction vested in him properly and judiciously. He has submitted that no conditional order could have been made under section 11 (4) of the Rent Act as has been made below Application Exh. 25 in the present case. The order striking off the defence of the defendant is vitiated. The ex parte decree passed against the defendant, therefore, requires to be set-aside. He has also urged that the issue as to the standard rent of the suit premises was resolved by the trial Court on 4th December, 1979 in its judgment. Since then, the defendant paid up the entire arrears of rent before the 1st day of hearing of the appeal and has been paying the rent regularly ever since. The decree for possession passed against the defendant should, therefore, be set-aside.

In support of his contentions, Mr. Shah has relied upon the judgments of this Court in the matters of Oza Kumbhar Naran Ala v. Meta Nanalal Jethabhai & Ors. [AIR 1988 Guj. 5]; of Vadhere Devabhai Govindji vs. Rameshwarpuri Ratanpuri [1984 GLH 110] and of Harkisondas Chunilal Chokshi vs. Prabhavatiben, Wd/p. Shah Ambalal Laxmichand [14 GLR 438]. He has also relied upon the judgment of the Bombay High Court in the matter of Messrs. Klim Plastic Products v. Messrs. Paradise Industrial Corporation [72 B.L.R 224].

In the matter of Oza Kumbhar Naran Ala [Supra], the presumption of service of notice and the refusal of the same was not established before the court below. In a revision preferred before this Court. The Court held that, "..The evidence regarding refusal of notice must be very clear and convincing. The reason is that there are very drastic consequences of such deemed service of notice.... Therefore, the Court has been extra careful in accepting the evidence regarding refusal and deemed service."

In the matter of Vadhere Devabhai Govindji {Supra}, this Court has held that, "the presumption that arises is two fold : one under section 27 of the General Clauses Act as to due service of notice and receipt thereof by the addressee within reasonable time and in case if there is an endorsement of refusal on the

envelop, a presumption arises under section 114 of the Indian Evidence Act, 1872 that it was duly tendered to the addressee, but he refused to receive the same. Both these presumptions are of fact and are rebuttable. "

In the matter of Messrs. Klim Plastic Products [Supra], the order made by the trial Court under section 11 (4) of the Rent Act was held to be bad. The High Court held that, ".. The section does not authorize the court to strike the defences straightway. No such direction can be given under section 11 (4)."

In the matter of Harkishondas Chunilal Chokshi [Supra], the Division Bench of this Court has discussed the scope and ambit of section 11 of the Rent Act in great details. With respect to sub-section (4) of Section 11 of the Rent Act, the learned Judges upheld the validity of the said sub-section. While considering the scope and effect of the said sub-section (4), the Bench held that, "...it is clear that the tenant in case of non-compliance with the order of the court would neither be entitled to appear in nor defend the suit except with the leave of the Court if a direction in that behalf has been issued by the court. Unless the tenant applies for leave to defend and the leave is granted to him unconditionally, or if granted conditionally unless the conditions are fulfilled, the tenant would not be entitled to appear and participate at the hearing of the suit. It requires to be noted, however, that this is not a provision analogous to the provision of Order XI Rule 21 of the Code of Civil Procedure which speaks of striking out defence in case of non-compliance with the order of discovery made by the Court. If the tenant has already filled his written statement of defence or even led evidence before the order is made or becomes effective the written statement of defence or the evidence on record, as the case may be, would not as it were be obliterated from the record nor does it necessarily follow that when leave to defend has been refused to the tenant, the court would be bound to pass a decree in favour of the landlord." While applying this ratio to the order in question, which in terms ordered striking off of the defence, the Bench said that, "we have pointed out that the court has no jurisdiction under this sub-section to direct that the defence may be struck off. Such an order could not, therefore, have been passed under sub-section (4) of section 11."

The learned advocate Mr. S.M Shah has appeared for the respondent-Plaintiff and has contested the Revision Application. He has submitted that having

regard to the conduct of the defendant, the trial Judge was justified in making order below Application Exh. 25, as has been done. He has submitted that it is not true that the learned Judge has ordered striking off of the defence of the defendant but the order was made in terms of sub-section (4) of section 11 of the Rent Act. The same, therefore, cannot be said to be vitiated. He has further submitted that admittedly, on the date of the suit notice, the defendant was in arrears of rent and even pending the trial, the defendant neglected to pay the arrears of rent and to comply with the directions issued by the trial Court. As to the service of the suit notice, Mr. Shah has submitted that the return of the registered post sent to the defendant raises a presumption of valid service of the suit notice. He, does admit that the said presumption can be rebutted by leading proper evidence. However, in the present case, no such evidence has been led. The defendant has failed to rebut the presumption arising under section 27 of the Bombay General Clauses Act, 1904 and section 114 of the Indian Evidence Act, 1872. In his submission, the payment of amount of arrears of rent after the date of the decree and the regular payment/deposit made thereafter are of no consequence and shall not affect the decree passed on the ground of arrears of rent.

Coming to the facts of the present case, it should be noted that it is not right to say that order below Application Exh. 25 was made ex parte on the date on which the suit was not posted for hearing, as alleged by Mr. Shah. The Application Exh. 25 was made on 28th July, 1978 and was served to the learned advocate appearing for the defendant on the same day i.e., on 28th July, 1978. The application was heard [as recorded in the Rojkam] on 16th January, 1979. Till that date, no reply to the application Exh. 25 was filed by the defendant. On 16th January, 1979, the suit was adjourned to 17th January, 1979 for order on Application Exh. 25. Accordingly, the order has been made below Application Exh. 25 on 17th January, 1979. The contention that the defendant was residing at Calcutta and had not received the suit notice nor the defendant refused to receive the same also has no bearing. From the records, it appears that the defendant had sent certain amount of rent on 31st October, 1975 from the suit premises [Exh. 39]. Similarly, the letters [Exh. 40 & 41] had been sent by the defendant on 25th December, 1975 and 24th April, 1976 respectively from the suit premises. Even as late as on 7th October, 1976, i.e. after the date of the suit notice and before the date of refusal of its receipt by the defendant, the defendant had sent letter Exh. 45

alongwith a cheque for Rs. 500/=, being the amount of rent for four months from 1st February, 1976 to 31st May, 1976, from the suit premises.

Two questions arise for my consideration - {i} whether the Trial Court was justified in making the order under Application Exh. 25 and in refusing the permission to defend by order made below Application Exh. 59 and {ii} whether the service of the suit notice upon the defendant was validly made.

The relevant part of the order made in exercise of the power conferred under section 11 (4) of the Rent Act has been reproduced in the earlier part of this judgment. As it is evident, what the learned Judge did was that the defendant was directed to deposit the arrears of rent on or before a specific date and to make regular payment of the rent thereafter failing which the defendant would not be entitled to appear in and defend the suit. In my view, the order made by the learned Judge was in consonance with the power vested in him under section 11 (4) of the Rent Act. The order made by the learned Judge was not the same as 'striking off the defence', as was done in the above referred two judgments relied upon by Mr. Shah. As explained in the matter of Horkishandas Chunilal Choksi [Supra] striking off the defence would have the effect of obliterating the defence which had already come on the record while not allowing the defendant to appear and participate in the suit proceedings would have effect on the date of the order i.e., any defence which has come on the record in the form of pleadings and the evidence would remain on the record and would be required to be considered by the court concerned. Thus, in the present case, the learned trial Judge cannot be said to have exceeded his jurisdiction or to have exercised jurisdiction not vested in him. Besides, the conduct of the defendant also does not warrant indulgence by the Court in favour of the defendant i.e., inspite of the direction issued by the Court not only the defendant did not deposit the amount of arrears of rent, he also neglected to make payment of rent regularly. The conduct of the defendant shows lack of bona fide. In the submission of Mr. Shah, the defendant could not make such payment on account of his weak financial condition. The submission is not supported by the record. In neither of his applications Exhs. 31, 34 or 59, the defendant has referred to his weak financial condition. Thus, in my view, the learned trial Judge was justified in making the order below Application Exh. 25 and in refusing to give permission to defend and appear in the proceedings. As to the

service of the suit notice, it is clear that the suit notice was addressed to the defendant and was sent at the the suit premises. A presumption of valid service of suit notice and the knowledge of the contents thereof should arise under clause 27 of the Bombay General Clauses Act, 1904 and section 114 of the Indian Evidence Act, 1872. The said presumption has not been rebutted by the defendant. In absence of rebuttal, the said notice is required to be held to have been duly served upon the defendant.

These two questions having been answered against the defendant, the decree for possession, as the defendant was admittedly in arrears of rent and had neglected to pay rent pending the trial, passed by the Courts below does not warrant interference. No other contention is raised before me. The Revision Application is dismissed with costs. Rule is discharged. Interim stay is vacated.

The learned advocate Mr. D.M Shah requests that the interim stay be continued for a period of three months. The request is granted. The interim stay operating pending this Revision Application shall continue to operate till 1st December, 2002 on the same terms and conditions.

[Miss R.M Doshit, J.]

Prakash*